Administrative Office of the Courts

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MEMORANDUM

To: **Judicial Council**

From: **Brent Johnson, General Counsel**

Re: **Rule 3-202, Court Referees**

Date: **August 10, 2004**

The Judicial Council has asked me to review Rule 3-202 of the Utah Code of Judicial Administration, which discusses the authority of court referees. This review is to determine whether the rule comports with Salt Lake City v. Ohms, 881 P.2d 844 (Utah 1994). The issue of whether courts are complying with the rule, or whether courts are complying with Ohms in spite of the rule, is beyond the scope of this opinion. I have not researched the actual practices of individual courts. In analyzing the rule, this opinion will hopefully provide guidance to courts on their practices. In my opinion, the rule violates Ohms. However, it is possible that individual courts have already implemented the necessary protections to avoid the constitutional implications.

In Salt Lake City v. Ohms, the Utah Supreme Court determined that Utah Code Ann. § 78-3-31 violated the Utah Constitution because the statute granted court commissioners "the ultimate judicial power of entering final judgments and imposing sentence in criminal misdemeanor cases." Id. at 855. Prior to Ohms, § 78-3-31 allowed court commissioners to accept pleas and enter final judgments in misdemeanor cases. For example, the court commissioner in Ohms presided over a bench trial of a class C misdemeanor. The commissioner determined guilt and sentenced the defendant. Since Ohms, the judiciary has restricted the criminal cases handled by court commissioners in district court.

There were several reasons for the court's decision in Ohms. However, the primary reason

was that core judicial functions could not be delegated to non-judges.[1] The court reasoned that Article VIII judges were appointed through a rigorous constitutional process and ultimate judicial power may only be exercised by those who have been appointed through that process.

The majority and dissenting opinions in Ohms, reflect the tension between the practical realities of a judicial system that relies on many individuals for its work, and the constitutional realities that limit certain functions to Article VIII judges. This tension is certainly present with court referees. Court referees perform valuable functions for the judiciary and the judiciary might be significantly burdened without the extensive assistance of these referees. Although valuable assistance is provided, the judiciary must ensure that referees do not perform core judicial functions. The Constitution cannot be sacrificed for the needs of the judiciary.

It should be noted that the Ohms decision rejected any argument that core judicial functions are only those that are exercised in more serious cases. A core judicial function is the same whether it is exercised in misdemeanor cases or in felony cases.[2] Thus, the judiciary cannot confer any more authority on a referee in a speeding case than it could in a felony theft case.

The relevant inquiry under Ohms is whether the judiciary, through Rule 3-202, has impermissibly attempted to delegate core judicial functions to court referees. In State v. Thomas, 961 P.2d 299 (Utah 1998), the court summarized the holding of Ohms. The court stated that "core judicial functions include (1) the power to hear and determine controversies between adverse parties and questions in litigation, (2) the authority to hear and determine justiciable controversies, (3) the authority to enforce any valid judgment, decree or order, and (4) all powers that are necessary to protect the fundamental integrity of the judicial branch." Id. at 302. The court stated that "core judicial functions do not include functions that are generally designed to 'assist' courts, such as conducting fact-finding hearings, holding pre-trial conferences, and making recommendations to judges. In these instances, the . . . actions are reviewable by a judge; thus, ultimate judicial power remains with the judge." Id. According to Thomas, a non-Article VIII judicial officer may conduct certain proceedings and recommend dispositions, but may not ultimately determine the outcome of a case or the fate of a defendant.

If court referees are hearing and determining cases or controversies, then the court referees

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[1]In the recent case of Jones v. Utah Board of Pardons and Parole, 2004 UT 53, the court appears to state that its holding in Ohms is limited to the delegation of functions in courts of record. This holding may create a difference between how referees may be used in justice courts and how they may be used in district courts.

[2]The Jones court recognized that judges in justice courts perform core judicial functions. However, delegation of those functions to non-judges in a court not of record may be less of an issue because, according to Jones, justice court judges are not Article VIII judges. Thus, even though a core function is the same in every case type, the delegation of those functions is less of a concern in courts not of record.

are acting without appropriate authority. The concepts of "hearing" and "determining" are intertwined. Each must be present to constitute a core-judicial function. As stated by the Thomas court, a non-judge may "hear" controversies by conducting fact-finding. Presiding over an evidentiary hearing and gathering facts upon which a decision will be made is not automatically a core judicial function. Furthermore, the act of determining a case, standing alone, might not be a core judicial function. For example, Rule 55 of Utah Rules of Civil Procedure allows a court clerk to enter default judgments and Rule 4-704 of the Utah Code of Judicial Administration authorizes court clerks to dismiss citations if certain criteria are met. These determinations are presumably not core functions because the clerks do not hear the case by engaging in fact-finding or fact-gathering. More importantly, the clerks do not exercise discretion in their decisions. The exercise of judgment or discretion in evaluating potentially disputed facts or evidence may be critical in determining whether the action constitutes a core judicial function. The Constitution is violated when a non Article VIII officer hears a controversy and then exercises judgment and determines its outcome, without direct review by a judge. The court referee rule seems to violate that principle.

Among the duties listed in Rule 3-202 are: (1) the authority to "adjudicate . . . those offenses listed in the uniform bail schedule not requiring court appearance by defendant"; (2) the authority to "establish bail, order dismissals, refer persons to traffic school or otherwise equitably dispose of citations"; and (3) the authority to "review the offense described on the citation . . . and propose a mutually acceptable disposition." Court referees ostensibly have authority to adjudicate, dismiss and dispose of citations. A citation is a controversy between a defendant and a government entity. Many of the actions listed in the rule represent a final determination of these citation controversies. If court referees are gathering facts and exercising discretion in making these final determinations, then the actions are unconstitutional.

Under the rule, the work of a referee consists of reviewing traffic citations, listening to defendants and proposing a "a mutually acceptable disposition." Rule 3-202(7)(c). The mutually acceptable disposition would most likely result in one of several types of dispositions: (1) dismissal of the citation; (2) set conditions upon which the defendant would plead guilty - including pleas in abeyance - such as fines and/or community service; (3) a combination of a guilty plea to some charges and dismissal of others; or (4) perhaps a diversion program. Setting aside the core judicial function issue, the process creates a concern about the plaintiff's side in these controversies. The governmental entity that issues the citation apparently is not involved in the disposition discussions. The court referee essentially conducts the prosecutor's role of plea bargaining. The referee offers a deal to which the defendant can plead guilty or which will result in dismissal. This may be an impermissible delegation or performance of the prosecutorial or executive function. Prosecutors may be perfectly willing to have referees perform this duty, but it may be impermissible to delegate that function, or for a court employee to accept such a delegation. Nevertheless, I raise this issue only as a passing concern. Courts routinely resolve cases without active participation by a prosecuting entity.

Returning to the core judicial function issue, the most difficult question is determining whether this disposition process constitutes ultimate judicial authority. In many situations, the

referee will work from the bail schedule and offer the amount that is listed. However, under the rule a referee might also offer an amount that deviates from the schedule or includes other conditions.[3] If referees exercise discretion and deviate from the schedule, their actions are unconstitutional unless the actions are reviewed by a judge.

The Judicial Council promulgates the Uniform Fine and Bail Schedule under Utah Code Ann. § 76-3-301.5. The Judicial Council is an administrative body. The Judicial Council's authority does not include judicial functions and therefore, pursuant to the Code, the fine schedule is only a recommendation. Judges ultimately determine whether to accept the Judicial Council's recommendation in individual cases. Although the schedule is routinely used by court clerks to inform defendants about the amount they should remit on a citation, the fact that the schedule is only a recommendation, and the fact that judges are ultimately accepting that recommendation, cannot be lost.

Section 77-7-21(1)(b) states that a defendant, with the approval of the magistrate, may voluntarily forfeit bail on a citation. The voluntary forfeiture is treated as a guilty plea. In thousands of cases throughout the state, defendants essentially plead guilty to a citation by sending in the appropriate bail/fine amount.[4] A court clerk notifies the defendant of the amount that should be deposited as bail. The judge may then accept the defendant's voluntary forfeiture of the bail as a conviction. The defendant never appears before a judge. The citation and payment are processed by a court clerk without any direct involvement by the judge. Although this work is usually performed by clerks, the work is done under the direction, and with the approval of, the judge. The judge provides instruction to the clerks on the amount that defendants should deposit as bail. The judges then instruct the clerks to accept the voluntarily forfeited bail as the fine. Thus, although the clerks are working from the bail schedule, it is the judges who are accepting the recommendations of the Judicial Council and instructing clerks accordingly. Only the judge can accept and approve the defendant's guilty plea through the voluntarily forfeiture of bail.[5]

This concept of judicial instruction and direction is potentially lacking in the situation of

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[3]In a recent newspaper article on court referees it was reported that referees might offer to dismiss one charge upon agreement to plead guilty to another charge. The referees might also reduce fines, waive certain fees or offer community service in lieu of a fine.

[4]This statute complicates matters further. The Utah appellate courts have emphasized strict compliance with Rule 11, Utah Rules of Criminal Procedure, when courts accept guilty pleas. See State v. Dean, 2004 UT 63; and State v. Mora, 2003 UT App 117. In the majority of traffic convictions entered in the courts, a defendant essentially enters a guilty plea by sending a payment. The defendant does not personally appear and therefore Rule 11 is not followed.

[5]Much like the process established in the referee rule, this is done without the direct participation of the prosecution. However, prosecutors are aware of the bail schedule amounts and have arguably assented to the conditions upon which these convictions are entered.

referees. The rule creates problems in three areas. The rule allows referees to exercise discretion and instruct defendants to post bail in an amount different from the bail schedule. The rule then allows defendants to voluntarily forfeit the bail (plead guilty), without any input and direction from a judge. Finally, the rule allows a referee to dismiss a case without judicial approval.

Various courts have stated that the setting of bail is a judicial function. See e.g. Walden v. Roy, 156 F.3d 861, 874 (8th Cir. 1998). I have not found any cases in which a court has discussed whether it is a core judicial function. However, an initial bail determination can probably be made by a non-judge as long as the determination is reviewable by a judge.[6] The offering of bail by a referee may create problems if the decision is not subsequently reviewed by a judge. The problem is compounded if the defendant voluntarily forfeits the bail, without judicial review. To avoid this problem, court referees should only offer bail conditions that are approved by the judges, either pre- or post offer, similar to the situation in which judges supervise and approve the work of clerks.

If the local judge or judges can designate exact criteria under which referees may dispose of cases, similar to a bail schedule, then the Constitution will not be violated. Alternatively, if a process is created that provides for a judge to review the decisions of a referee, on a case-by-case basis, that would also be acceptable. Arguably, the rule provides for such review by allowing a defendant to withdraw a stipulated resolution. However, I do not believe that this is sufficient. As noted by the Ohms court, "it [is] not within [a defendant's] power to invest by a 'waiver' the right to perform core judicial duties in persons to whom that right has not been granted." Id. at 853. The rule allows a defendant to withdraw what amounts to an invalid waiver, but the rule does not provide a mechanism for a judge to review the decision of the referee. Although the result might ultimately be the same, the rule should set forth a process which is constitutionally permissible.

There are two primary mechanisms for addressing the problems with the rule. The first would be to define specific parameters under which court referees may operate. In many circumstances, this may have already occurred and those parameters could be outlined in the rule. The rule would have to either specifically outline the criteria under which cases may be resolved (i.e. if A then B), or instruct local judges to create that criteria. Defining specific conditions under which guilty pleas may be entered or citations dismissed may be no different than enacting a bail schedule. If the current bail schedule is insufficient to deal with these situations, then perhaps the bail schedule committee can expand the schedule to anticipate more circumstances and provide specific guidance to referees and judges.

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[6]In Utah, there are many bail commissioners, typically jail law enforcement officers, who set bail. Bail commissioners use state and local bail schedules to set bail. Arguably, bail commissioners are working from schedules that have been approved by judges and therefore they are not exercising independent discretion. However, even if they are exercising discretion, because these initial decisions are subsequently reviewable by a bail judge, these commissioners are arguably not exercising core judicial functions. See Walden, 126 F.3d at 874.

The second option for curing the core judicial function issue would be to provide a system of review by a judge. This process might be similar to the situation with court commissioners, in which a litigant may file an objection to a court commissioner's recommendation. The practical effect of such a change might be minimal. A defendant is unlikely to seek review of a disposition that is "mutually acceptable," and the prosecutors are usually unaware of specific actions and therefore unable to act. The rule could either require automatic judicial review of dispositions or could require that notice of the disposition be sent to the prosecuting entity with an opportunity to object before the disposition is final. The change would provide the prosecuting entity an opportunity to request review of the dismissal.[7] Any review should be conducted before the disposition becomes final to avoid double jeopardy and similar issues. Defendants would be instructed that the dispositions are not immediately effective.

Finally, as noted above, the Utah Supreme Court may be less concerned with court referee practice in justice courts than district courts. If justice court judges are not Article VIII judges, then they may be able to delegate their core functions without violating the Constitution. However, even if the practice is not unconstitutional, it is arguably bad policy to take decision-making from those who have passed a vigorous appointment process and give it to individuals who are merely hired to do a certain type of work. Also, current statutes and rules do not prohibit justice courts from using referees, and the practices from court-to-court may vary. In order to avoid this situation, the rule should also be amended to include referees in justice courts.

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[7]This concept is conspicuously absent from the current rule. The cases are apparently all resolved ex parte.